IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 59.

THE UNITED STATES, APPELLANTS,

vs.

JOHN R. GLEASON AND GEORGE W. GOSNELL, APPELLEES.

APPEAL FROM THE COURT OF CLAIMS.

Brief of Argument on Behalf of the Appellees.

STATEMENT OF THE CASE.

This appeal is from a decision of the Court of Claims covering two suits in that court, Nos. 17782 and 17783, consolidated for convenience (Record, p. 30), and heard and decided as one case, in which judgment was entered for the appellees.

The suits were filed in the Court of Claims by the appellees for breaches by the United States of two contracts,

the first (suit No. 17782) entered into August 4, 1885, between Lieut. Col. William E. Merrill, corps of engineers, United States Army, for and on behalf of the United States, and the appellees, as partners, for the excavation of 110,000 cubic yards, more or less, of rock in the improvement of the head of the Louisville and Portland canal at Louisville, Kentucky, which excavation is known herein as the Upper work.

The second contract (suit No. 17783) was entered into January 13, 1887, between Major Amos Stickney, corps of engineers, United States Army, for and on behalf of the United States, and the appellees, as partners, for the excavation of 124,000 cubic yards of earth and 13,000 cubic yards of rock, more or less, for enlarging the basin near the lower end of the same canal, which excavation is known herein as the Lower work.

In the suit arising upon the contract for the Upper work the Court of Claims made upon the evidence findings of fact I to XVII (Rec., pp. 30–38), and the conclusion and judgment that the appellees were entitled to recover the retained percentage of $3,011.99 and the net profits which they would have made on the contract, amounting to $60,537.50 (Rec., p. 42).

In the suit arising upon the contract for the Lower work the Court of Claims made upon the evidence findings of fact XVIII to XXV (Rec., pp. 38–42), and the conclusion and judgment that the appellees were entitled to recover the retained percentage of $2,401, and for the net profits which they would have made on the contract the further sum of $2,827.50 (Rec., p. 42).

In both cases the aggregate judgment in favor of the appellees against the appellants was for the recovery of $68,777.99 (Rec., p. 42).

After this judgment had been rendered the defendants below made motions in the Court of Claims for a new trial and for an amendment of the findings of fact (Rec., pp.

51–54). The motion for a new trial was overruled and the motion for amendment was granted in part (Rec., p. 54).

Thereupon the defendants below filed this appeal upon the merits, and also an appeal from the denial of the Court of Claims of the motion for a new trial (Rec., pp. 54, 55). The record presents the findings of fact as amended.

UPPER WORK.

The findings of fact show the following:

On August 5, 1885, the contract, with specifications as set out in full in the petition (Rec., pp. 10–15), was entered into between Lieutenant Colonel Merrill in behalf of the United States and the appellees, for the excavation of 110,000 cubic yards, more or less, of rock in the enlargement of the Louisville and Portland canal, to be completed on or before December 31, 1886 (Finding I, Rec., p. 30).

The compensation of the contractors was to be twofold, 85 cents per yard in cash (hereinafter shown to have been in itself less than the cost of excavation) (Finding XIII, Rec., p. 37) and possession of and property in the material excavated (Findings I, p. 30, and XIV, p. 37).

The rock to be excavated was in the river bed, in an exposed situation, and was exposed to great force of the river when the latter rose to stages above the top of the Government cross-dam, which was 5 feet high by the canal gauge (Finding V, p. 34).

Before the contract was entered into the engineer in charge prepared specifications for the information of bidders, which were exhibited to the claimants, and on the faith of which they entered into the contract. These specifications contained the provision that the contractor "must begin work within 20 days after notification that his bid has been accepted, unless hindered by high water." The claimants were advised by the ninth specification so exhibited that their contract would provide "that additional

time may be allowed to a contractor for beginning or completing his work in cases of delay from freshets, ice, or other force or violence of the elements and by no fault of his or their own" (Finding VI, p. 34).

In pursuance of these specifications, so exhibited by the engineer officer of the appellants, and amounting, as the appellees contend, to promises of protection against loss by freshets (much to be apprehended on account of the situation of the work in the river bed), and inducements to enter into the contract, the appellees undertook the excavation.

In performance of the promise held out by said specifications the contract, among other things, contained the following provision:

"If the parties of the second part shall by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time may in writing be allowed him or them for such commencement or completion as, in the judgment of the party of the first part or his successor, shall be just and reasonable" (Finding I, p. 30).

The season from August, 1885, to December 31, 1886, was favorable in the main for the character of work provided for in the contract, though the claimants were compelled by reason of high water and freshets to suspend their operations a number of times, and by reason of these difficulties, coupled with an insufficient force of men and other means necessary for the performance of the work, they only "completed 14 per cent. of their entire work" during the contract period (Finding II, p. 31).

In consequence of the claimants' inability to complete the work within the contract period, as aforesaid, they requested an extension of their contract to December 31, 1887, which was granted on conditions stated in a supplemental contract (Finding III, p. 31). Not only was this extension

granted, but thereafter, on January 13, 1887, the contract for the Lower work was entered into by the appellants with the appellees (Finding XVIII, p. 38).

The claimants, not having completed their contract for the Upper work during the year's extension thereof, as aforesaid, they, on December 31, 1887, requested a second extension of said contract to December 31, 1888, for the reasons set forth in their communication of that date (Finding IV, p. 32).

The extension of the time of said contract to December 31, 1888, as requested and recommended, was granted and approved by the Chief of Engineers "on condition that the provisions in their application be faithfully carried out," of which approval the claimants were notified (Finding IV, p. 34).

These various extensions were granted by the officers of the appellants as well for the benefit of appellants as for the benefit of the contractors. The letter of Major Stickney, the appellants' officer in charge, dated December 31, 1897, states: "The interests of the Government will be best served by an extension of time" (Finding IV, p. 33). Nowhere does it appear that any extension granted was granted by the officer of the appellants as a matter of grace to the contractors.

It may be here stated that the appellees' contention is that by these extensions either new contracts (with the same details and provisions except as to time) were entered into between the parties, and that the officer of the appellants could not assign as a breach of the latest or subsisting contract, or as a reason for its annulment, or as an excuse for not performing his own part any act, omission, or fault of the claimants (if any such there were) which occurred prior to the last extension, and to entering into such subsisting contract, or if the contract be considered as single and continuous, each extension of it by the appellants for their own benefit operated to waive and condone any fault, if such

there were, of the claimants occurring prior to such extension.

Up to the end of the year 1887 the appellees performed rock excavation according to the contract amounting to 35,435.22 cubic yards (Finding XII, p. 37), for which they were paid the contract price of 85 cents per yard, less 10 per centum reserved by the appellants, amounting to $3,011.99, which latter sum has never been paid by the appellants to the appellees (Finding XI, p. 37).

During the period of the last extension, the year 1888, the appellees were able to perform comparatively little work. This arose from no fault of their own, as found by the Court of Claims (Finding VIII, p. 36), but from the unprecedented condition of the Ohio river (Findings VII, p. 34, and XVII, p. 38), in the bed of which the work lay exposed to the force of the waters when the river was at a high stage (Finding V, p. 34). This fully appears from the official reports of the appellants' officers (Finding VII, pp. 34–36). These reports show that high water prevented any work from and including December, 1887, up to some time in June, 1888. In June a dam was constructed and drilling and blasting performed on high points of the rock (report for June, Rec., p. 35), confirming Finding VIII (p. 36), of the diligence of the contractors during this season. In July this work on high points of the rock was continued, the water pumped out of the excavation pit, and the tracks for carrying away the rock put in order; but on July 11 the contractors were run out by high water (report for July, Rec., p. 35), and did not resume during that month.

In August excavation was continued until the 18th, on which date the work was flooded by high water (report for August, Rec., p. 35).

In September no work was done, "since the contractors were run out by high water" (report for September, Rec., p. 35).

In October a temporary earth dam was begun on the 5th.

The pump was started on the 9th. On the 11th the river washed away the dam (report for October, Rec., p. 36).

The river remained over the contractors' section from October 11 till the end of November (report for November, Rec., p. 36).

In December no work was done (report for December, Rec., p. 36).

There is no contention but that high water prevented any work in December. The report does not state the reason. But the report for October did not state the reason for no work being done after the 11th; yet it appears from the November report that "the river has been over their section since that date," viz., October 11.

It is to be noted that these current reports, made at the time and before this controversy arose, contain no suggestion of fault or want of diligence in the contractors, but recognize the impracticability of performing the work when the river was at the high stages mentioned by the reports.

Accordingly the court below upon all the evidence, including these official reports of the appellants' engineer officer in charge of the work, finds as facts:

"The condition of the Ohio river was during the season of "1888, the period of the last extension, unusual and unprece- "dented for repeated and continued freshets and high water, "overflowing the cross-dam aforesaid; in consequence of "which freshets and high water the working season of 1888, in "the Ohio river at Louisville, Ky., was limited to about thirty- "five days, mostly in July and August" (Finding VII, p. 34); that "during the working season of 1888 the claimants "were diligent in the prosecution of work embraced in the "contract, in preparing therefor, and endeavoring to ex- "clude the water and freshets of the river. They provided "for the additional plant mentioned in their application "for extension and had it ready for operation at the begin- "ning of the season of 1888. But there was insufficient

"working time to complete the work by December 31, "1888, at the rate of 640 cubic yards for each prac- "ticable working of twenty-four hours, and this from "no fault of the claimants during the last extension "of their said contract. No act or omission of the "claimants during the period of the last extension made "it impossible to complete the work by December 31, 1888" (Finding VIII, p. 36); that "from the foregoing official "reports, as well as from the other facts found herein, the "court finds the ultimate fact that the condition of the river "was as herein set forth; and the time remaining for active "work, after deducting the time when it was impossible to do "work by reason of the high water and freshets, was insuf- "ficient for the completion of the work under the contract "within the period of extension, and that it was impossible "for the complainants to complete the work within the "working time thus remaining" (Finding XVII, p. 38).

Interpreted in any reasonable way, these official reports of the appellants by themselves fully confirm the finding of the court below as to the condition of the river, to say nothing of the other evidence which was before the court on this point, referred to generally in Finding XVII.

The contention of the appellees upon these facts is that the contingency provided against in the contract arose, and that they were "by freshets, ice, or other force or violence "of the elements and by no fault of their own prevented "from completing the work," and that they were entitled as a matter of right, if the provision of the contract means anything and is to be given any contractual effect, to an extension of their time for performing the work.

The last extension of the contract to December 31, 1888, having thus expired without the completion of the work, the appellees applied for a further extension, under that clause of the contract which provided for an extension in case of freshets and force and violence of the elements, which was refused (Finding X, p. 36).

Upon the evidence below on this point the Court of Claims found that "the defendants nor the engineer officer in charge "on their behalf did not annul or terminate the contract as "therein provided for by reason of any delay or for any "want of faithfulness or diligence on the part of claimants "in the prosecution of the work thereunder during the "period of the last extension of said contract, but based his "refusal to further extend the contract because, as he as-"serted, the claimants had for a number of seasons failed to "complete the work within the time agreed upon.

"No judgment or decision was given by said engineer on "the question as to whether the claimants were prevented "by freshets and force and violence of the elements during "the season of 1888 from completing the work agreed upon "within the period limited by the last extension of the con-"tract, nor did he find or decide that the claimants were "not so prevented" (Finding X, p. 36).

The contention of the appellees upon these facts is that they show the action of the engineer officer of the appellants to have been arbitrary, unreasonable, and unjust, involving such refusal to do what the contract required or such gross mistake as necessarily implies a failure to exercise an honest judgment.

The contract provided for its annulment by the appellants in case of any want of faithfulness or diligence on the part of the contractors (Finding I, p. 31). No annulment or termination of this contract for this cause was ever made by the appellants nor their officer (Finding X, p. 37).

The appellees submit that the facts found by the court below, and above recited, show a breach of the contract by the appellants, resulting in a loss to the appellees of the profits which they would have made by a completion of the contract, which should be made good to them, as far as possible, by an award of damages.

As to the result to the appellees of completing the work, the court below found that there remained to be excavated

83,500 cubic yards of rock (Finding XII, p. 37); that the excavation of the same would have cost the appellees $33,400 in excess of the contract price (Finding XIII, p. 37), but that the excavated rock was under the contract the property of the contractors and a part of the consideration (Finding XIV, p. 37); that the remaining rock would have produced 125,250 cubic yards of broken stone, for which there was a ready market, and of a net value to the contractors of $93,937.50 over the cost of crushing and delivering (Findings XIV–XVI, pp. 37, 38).

The profit to the contractors in performing the remaining work would have been $93,937.50, less the loss on excavation of $33,400, or $60,537.50 net profit (Finding XVI, p. 37).

The other item of damage is 10 per centum of the money earned on completed excavation, which 10 per centum has been retained by the appellants and amounts to $3,011.99 (Finding XI, p. 37).

The total damage to the appellees under this contract for the Upper work, as found by the Court of Claims, is $63,549.49 (Conclusion, Rec., p. 42).

LOWER WORK.

As the points of law hereinafter referred to are substantially the same in both cases, the statement of the case relating to the Lower work will here be made.

The findings of fact of the Court of Claims show that on January 13, 1887, the contract with specifications, as set out in full in the petition (Rec., pp. 23–29), was entered into between Major Amos Stickney, in behalf of the United States and the appellees, for the excavation of 124,000 cubic yards of earth and 13,000 cubic yards of solid rock, more or less, for enlarging the basin of the Louisville and Portland canal at the head of the locks, at the rate of 17½ cents per cubic yard for the earth and $1.05 per cubic yard for rock excavation, the work to be completed by December 31, 1887.

The contract contained the same clause as to extension of time in case of freshets and force and violence of the elements already referred to above in the case of the contract for the Upper work (Finding XVIII, Rec., p. 38).

The claimants entered upon the performance of this contract, and on December 28, 1887, not having completed the same, requested an extension of time until June 1, 1888 (Finding XIX, Rec., p. 39).

This extension was granted upon the ground that "nothing would be gained by a denial of this request."

A further request for extension, because of loss of time from high water and other causes, to August 31, 1888, was granted upon the recommendation of the officer of the appellees, saying, "It is believed the interests of the Govern-"ment will be best served by granting the extension."

A final extension to December 1, 1888, was requested on account of high water on two occasions since June 1, 1888, and was granted (Finding XIX, Rec., pp. 39–41).

These several short extensions were granted for the benefit of the appellants (see the recommendations of the engineer officer quoted in Finding XIX, p. 40), and there is nothing to suggest that they were granted as a matter of grace or indulgence to the appellees.

As in the case of the contract for the Upper work, the appellees contend that a new contract was entered into by the last extension to December 1, 1888, and in any event that all previous causes of forfeiture or annulment, if any existed, were waived and ceased to be of any further force or effect for either party.

Considering the conditions as existing during the last extension, the Court of Claims found that:

"The condition of the Ohio river during the season of "1888 was unusual and unprecedented for repeated and "continued freshets and high water, in consequence of "which the claimants were, during the period of the last "extension of their contract, by freshets or force and vio-

" lence of the elements and by no fault of their own, pre-
" vented from completing the work at the time agreed upon
" in the contract as extended " (Finding 20, p. 41).

At the time the appellees were thus compelled to cease work they had completed according to the contract the excavation of 120,052 cubic yards of earth (97 per cent. of the whole and not 14 per cent., as stated in Appellees' Brief, pp. 39, 40) and 3,575 cubic yards of solid rock (Findings XXIV, p. 41, and XXV, p. 42).

In this condition of affairs the appellees invoked the provisions of the contract relating to freshets, and applied for an allowance of additional time. The Court of Claims find the circumstances of this application and its result to be as follows:

" At or near the end of the year 1888 the claimants,
" through the personal solicitation of their attorneys, Bodley
" and Simrall, applied to the engineer in charge for an allow-
" ance of additional time for the completion of the work
" agreed upon in the contract, for the reason that they had,
" by reason of freshets and force and violence of the elements,
" and by no fault of their own, been prevented from complet-
" ing the work at the time agreed upon in the contract as
" extended; whereupon the engineer in charge refused to
" allow such additional time.

" The defendants nor the engineer officer in charge on
" their behalf did not annul or terminate the contract as
" therein provided for by reason of any delay or for any
" want of faithfulness or diligence on the part of claimants
" in the prosecution of the work thereunder during the
" period of the last extension of said contract, but based his
" refusal to further extend the contract because, as he as-
" serted, the claimants had for a number of seasons failed to
" complete the work within the times agreed upon.

" No judgment or decision was given by said engineer on
" the question as to whether the claimants were prevented
" by freshets and force and violence of the elements during

"the season of 1888 from completing the work agreed upon "within the period limited by the last extension of the con- "tract, nor did he find or decide that the claimants were "not so prevented" (Finding XXI, p. 41).

The contention of the appellees upon these facts is that they were prevented from completing the work contracted for by freshets and by no fault of their own; were therefore entitled to an extension of time, and that the refusal of the same by the appellants, through their officer, was a breach of the contract for which the appellees are to be indemnified as far as possible.

The items of damage proved and found by the court below are two: First, the 10 per centum of money earned on completed excavation which has been retained by the appellants. This amounts to $2,401 (Finding XXIII, p. 41). Second, the immediate profits which the appellees would have made in completing the remainder of the work. This is found to be 30 cents per yard on 9,425 remaining yards of rock, amounting to $2,827.50 (Findings XXIV and XXV, pp. 41, 42).

The total damage to the appellees under this contract for the Lower work is found by the Court of Claims to be as above, amounting to $5,228.50 (Conclusion, Rec., p. 42).

ARGUMENT.

Assuming the conclusiveness of the findings of the Court of Claims as to matters of fact—

United States *vs.* New York Indians, decided March 30, 1899;

Stone *vs.* United States, 164 U. S., 380;

Desmore *vs.* United States, 93 U. S., 605;

Talbert *vs.* United States, 155 U. S., 45;

McClure *vs.* United States, 116 U. S., 145—

it remains to consider the questions of fact as presented by the findings and those of law which arise thereon.

I.

CONSTRUCTION OF THE CONTRACTS.

The making of the contracts for the Upper and Lower works between the appellants and appellees and the provisions of the contracts in detail are established by Findings I (Rec., p. 30) and XVIII (p. 38), which refer to the petitions for the terms of the contracts in full (Rec., pp. 10 and 23).

The first question which arises on each contract is in respect of the construction of the provision for allowing additional time if the contractors shall, by freshets, etc., and by no fault of their own, be prevented from commencing or completing the work at the time agreed upon.

The contention of the appellees is that this clause is a vital part of the contract, under which they are entitled as a matter of right to additional time if any of the contingencies provided against arise. The court below found that freshets supervened and prevented the completion of the works without fault of the appellees (Findings VII, VIII, XVII, XX, Rec., pp. 34–41), and the appellees claimed their

rights under said clause of the contracts, but were denied (Findings X, XXI, pp. 36 and 41). The question is thus squarely presented whether said clause is a material part of the contracts and is to be given any contractual effect or is merely superfluous, leaving the contracts to be construed exactly the same with the clause in them as they would be if it were absent.

INTERPRETATION OF THE WORD "MAY."

In the provision relating to the allowance of additional time, in case the contractors are prevented from commencing or completing the work at the times stated by freshets or other force and violence of the elements, and by no fault of their own, the word "may" should be interpreted to mean the same as "shall."

The principal rules governing the construction of contracts and applicable to the written agreements involved in this appeal all unite in requiring that the word "may" in the provision for additional time in case of freshets, etc., be construed to mean the same as "shall." Such rules are these:

1. "The interpretation of a contract should be favorable and liberal" (Story on Contracts, sec. 640).

2. Effect must be given, if possible, to every part and word (Shep. Touch., 87; Story on Contracts, sec. 640, 658*a*; Washburn *vs.* Gould, 3 Story R., 162).

3. All parts are to be taken together to ascertain and give legal effect to the true intention of the parties, without merely weighing the precise effect of single words (Washburn *vs.* Gould, *supra*).

4. And, as a last resort, doubtful words are to be taken most strongly against the speaker or person engaging him-

self by them (Story on Contracts, sec. 662; 2 Kent Com., 556; 1 Powell on Contracts, 395).

It is a favorable and liberal and no more than reasonable construction to give the contracts to hold that by the provisions under discussion the contractors *shall* be excused for non-performance without fault of their own if such failure is caused by freshets, etc. Such interpretation works not the slightest injustice to the other party and fulfills the first rule of construction above.

It is at once evident that to interpret "may" in its strict literal sense, as merely permissive, leaves the contracts of just the same effect *with* the word and its context as they would be *without* them. This does unnecessary violence to the contracts in obliterating a considerable portion of them—over ninety words in each—and violates the second rule of construction mentioned above.

Interpreting by the context, the words "by no fault of his or their own" seem conclusive as to the contractual nature and effect of this provision for the allowance of additional time and the mandatory character of the word "may." If this word is merely permissive, the contractors have no more right and are in no better position if without fault than if in fault. The context certainly implies that by being without fault, which is for the benefit of the United States, the contractors become *entitled* to a reciprocal benefit.

Considering the whole instrument "by the four corners," it appears that the work was excavation in a river bed peculiarly exposed to freshets, ice, and the force and violence of the elements; that to excuse the contractors for non-performance, even if prevented by the act of God, a special provision would be necessary (opinion below and authorities cited, Rec., p. 46); that the advertisement to bidders for the contract of August 4, 1885 (which is in terms made a part of the contract, Rec., p. 10), contains a clause which would appear to the layman to be a reasonable and effectual protection against such unlimited responsibility

(Rec., p. 12, par. 9), and that, finally, the promised provision *was* included in the contract, nearly one hundred words of the instrument being devoted to the purpose. The conclusion is irresistible that it was the intention of the contractors to be contractually, as a matter of right, protected by this provision, and that it was equally the intention of the officers then acting on behalf of the appellants to grant the contractors additional time if they should be prevented from performance by the act of God. Thus interpreting the word "may" by the context and by the whole instrument, the third rule above mentioned is followed and an intelligent and reasonable meaning is reached.

The contracts are in the usual form, printed *by the Government* for public works (Rec., p. 12, paragraph 9). Besides being the writers of both instruments in their entirety in the clause in question, the appellees were the speakers, making an engagement to the other parties (of the second part). Under the fourth rule above, "may" should be construed rather against the first party and in favor of the contractors to give a contractual right to additional time if prevented by freshets.

A special rule of construction is applicable to the contract of August 4, 1885 (which was preceded by the promise of protection in the 9th paragraph of the advertisement noted above, Rec., p. 12). This rule is well stated in Story on Contracts, sec. 664, as follows:

"If the inducement or proposition upon which a contract "is founded be ambiguously stated by one party, so as to "operate as a surprise upon the other party, such statement "will be construed in favor of the party deceived, although "the deception be unintentional. For in such case, the "party affording a ground of mistake should bear the re-"sponsibility."

In the great majority of instances where the meaning of the word "may" has been adjudicated it has been held to be mandatory and to be the same as "shall." It is suffi-

cient to refer to the leading cases of The King *vs.* The Inhabitants of Derby (Skinner, 370) and The King and Queen *vs.* Barlow (2 Salkeld, 609), both approved and followed by this court in Supervisors *vs.* United States (4 Wall., 435). The necessity for interpreting this word often arises in the case of statutes. An important reason for holding it to be the same as "shall" is that it ordinarily occurs in such a connection as "the sheriff *may* take bail," relating to the doing of some act by a *public officer*, who, it is presumed, will do what is right and just; so that the legislature, knowing that the officer will do this, is assumed (in judicially interpreting the word) not to have been particular and exact in its language, and the intent of the word is given effect regardless of the fact that it is actually permissive.

This reason applies to the case at bar. A sworn public officer, such as the United States Army engineer in charge of public work, has a status beyond that of a private citizen, and in making the contracts between the appellants and appellees it was assumed that such an officer would be a perfectly safe repository of so important a power as that of allowing the contractors additional time for the commencement or completion of the works contracted for in case of prevention by freshets, etc., and would do right and justice, and that the particular language used in such a provision of the contract was unimportant.

This court, through Mr. Justice Swayne, has expressed the principle in the following language:

"The conclusion to be deduced from the authorities is, "that where power is given to *public officers*, in the language "of the act before us, or in equivalent language—whenever "the public interest or *individual rights* call for its exercise— "the language used, though permissive in form, is in fact "peremptory. What they are empowered to do for a third "person the law requires *shall* be done. The power is given, "*not for their benefit but for his.* It is placed with the de-

"pository to meet the demands of right, and to prevent a "failure of justice. It is given as a remedy to those entitled "to invoke its aid, and who would otherwise be remedi- "less."

Supervisors *vs.* United States, 4 Wall., 435. (Italics our own.)

While the above language was used in construing a statute, the same principles of exposition apply both to statutes and contracts.

Smith on Contracts, 6th ed., 483, 501.

To slightly paraphrase an ancient statement of the common law relative to the King's grant, "it is for the benefit "of these citizens and for the honor of the Government, "which is rather to be regarded than its profit" (Com. Dig. Grant, G. 12; 9 Co. R., 131), that these contracts should be interpreted, in respect of the word "may," as the appellees contend.

It has heretofore been argued on behalf of the appellants that in case of freshets, etc., an extension of time could only be appealed for as a matter of "grace," trusting to the "sense of justice" of the engineer in charge, and that an extension depends upon the "conscience" of that officer. The appellees submit that to thus construe the contracts makes them unconscionable, destroys their essential mutuality, and constitutes the clause as to extension in case of freshets (both in the advertisements to bidders and in the contracts) as a mere trap to induce parties to enter into the contracts, but from which they can derive no contractual right. A contract will not be construed so as to be unconscionable against the United States (Hume *vs.* U. S., 132 U. S., 406), and contracts being construed according to the same principles, whether for or against the United States (U. S. *vs.* Smoot, 15 Wall., 36), they will not be made unconscionable by construction in favor of the latter.

It seems entirely hypothetical and inconclusive to argue, as do the counsel for appellants (page 18 of their brief), that "no contract whatever would have been made with these claimants" unless the engineer officer had retained power to hold the contractors to full performance notwithstanding prevention by act of God. As a sober proposition this seems extraordinary, but its force is entirely offset by the opposite argument that the contractors would never have entered into a contract for the unlimited performance of such an exposed work irrespective of prevention by the act of God. If these arguments have any force in throwing light on the contract, that of appellees is the more forcible, for the contract, according to the appellees' understanding, is reasonable and usual, while according to that contended for by counsel for appellants it is unusual (considering the exposed nature of the work), unreasonable, and improbable.

The case of Kihlburg *vs.* The United States (Appellants' Brief, p. 18) by no means holds, positively or inferentially, that the officer of the United States *must* have unlimited discretionary power over contractors, but only decides that "*the* authority in question," to decide as to distance and quantity, was proper and usual, and that "it is not at all certain that the Government would have given its assent to any contract which did not confer upon one of its officers" *such* an authority. This is far from being parallel to a construction of a contract which shall give the officer *unlimited discretionary power to require performance, notwithstanding the act of God.*

II.

The Powers of the United States Engineer Officer under the Contracts.

These distinctly appear from an inspection of the contracts (Rec., pp. 10–15 and 23–29).

1. His decision as to quality and quantity shall be final (Rec., pp. 10, 24).

2. He shall have power, with the sanction of the Chief of Engineers, to annul the contracts by a notice in writing, for want of diligence in the contractors or failure to perform in accordance with the specifications (Rec., pp. 10, 12; pars. 7, 8, p. 24).

3. In case of prevention by freshets, etc., he shall judge what additional time is just and reasonable (Rec., pp. 11, 24).

4. Shall direct the work in certain respects (Rec., p. 12, par. 2; p. 26, pars. 3, 8; p. 27, pars. 13, 18; p. 28, par. 24).

The above four special powers are all that the engineer possessed under these contracts beyond what the contractors had.

The first and fourth powers above mentioned were duly exercised as the work proceeded and have not come in question. The second power (to annul) was never exercised (Finding X, Rec., p. 36; Finding XXI, p. 41).

Occasion arose for the exercise of the third power under both contracts, namely, the actual occurrence of the freshets and force and violence of the elements provided against, without fault of the appellees (Finding VII, Rec., p. 34; VIII, p. 36; XVII, p. 38; XX, p. 41). This is virtually admitted in Appellants' Brief, page 4.

But the power was not exercised, no judgment as to what additional time was just and reasonable was rendered by the engineer, and any extension whatever was refused (Finding X, p. 36; XXI, p. 41).

Counsel for appellants seem, we think, to misapprehend the position contended for by us and upheld by the lower court. On page 28 they say:

"The theory upon which the court below proceed is that by the terms of the contract the engineer was made an arbiter for the determination of this question between the claimants and the United States, and as such arbiter he failed to exercise *that degree* of disinterestedness and attention to the claimants' rights and interests which he should have exercised as an impartial umpire between the two parties to the contract."

Not so. Our contention goes far deeper, and is not merely that the engineer failed to exercise "that *degree* of disinterestedness," etc., but that he *utterly failed to exercise his judgment at all.* The findings (X, XXI) show that the engineer *failed* to exercise *any judgment* whatever upon the all-important question whether freshets, etc., and not any fault of the contractors prevented completion during the last extension. The brief continues (28):

"The contract does not create an arbiter, in the legal sense of that term, out of the engineer in charge of this work;" but follows this assertion with the statement that the contract "merely provides for the *creation of a ministerial agent,* who is to determine whether or not, under all the facts and circumstances of the case, the claimants were prevented from completing the work by reason of any fault or neglect or their own, or whether such non-completion within the time specified by the contract was solely caused by ice, freshets, or the force and violence of the elements." * * *

This is precisely what we contend for. It is immaterial to us whether the engineer be called an "arbiter," as we have claimed, or a "ministerial agent," as counsel for the

Government claim. If "the contract * * * provides for the creation of a ministerial agent," and further provides that he "is to determine whether or not, under all the facts, * * * the claimants *were prevented* from completing the work * * * by ice, freshets, or the force and violence of the elements," then we submit the contractors had a *right* to have him "judge" and "determine" whether they were thus prevented by the elements from completing the work, and it is his total failure to thus "judge" and "determine" upon this vital question of which we complain.

"In the second place," say counsel for appellants, "even after being so satisfied [that the failure to complete the work within the allotted time *was not* due to any fault on the part of the contractors, but *was* caused by the force and violence of the elements], he is invested with a discretion to extend or not extend the time, as he pleases. * * * The right to extension of the time, in case of prevention by the force and violence of the elements, could not be demanded by the claimants as a matter of right, but could only be appealed for as a matter of grace, trusting to the sense of 'justice and reasonableness' of the engineer in charge."

We deny this. If, as counsel here assume, the delay was caused by the "freshets" and not by fault of the contractors, we contend the contract means, and can only mean, that they shall have a reasonable extension of time, and the engineer is merely granted the discretionary power to judge and declare how long that time shall be.

If in a building contract it should be provided that "if the builder should be prevented by freezing weather from properly laying the foundation of a building, reasonable additional time may be allowed to him for that purpose," would any fair mind doubt that the real intention of the parties was that such freezing weather would *entitle* the builder to the additional time? It could mean nothing else, for without any such protective clause the property-

owner would, of course, have the right to grant such additional time to the builder. What meaning, then, can reasonably be given to the language that "if the builder should be prevented by freezing weather from properly laying the foundation of the building, reasonable additional time may be allowed him for the purpose," unless it means that in that event he *will* or *shall* have such additional time? And then suppose that to this clause of the building contract there were added the language "as in the judgment of the architect shall be just and reasonable." The right of the builder to additional time is not in the least destroyed by making the architect the judge of the *length* of time that will be reasonable.

And so here, when the specifications provided that should the contractors, by "freshets, ice, or other force or violence of the elements, and by no fault of their own, be prevented from * * * completing the work * * * at the time agreed upon * * * such additional time may, in writing, be allowed them for such completion as, in the judgment of the engineer, shall be just and reasonable," we contend that the language, rationally construed, means—and can only mean—that if the work is in reality prevented, not by their fault, but by "freshets, ice, or other force or violence of the elements," the contractors *will* or *shall* have a reasonable time to complete the work, and the mere fact that by an additional clause the *amount* of such additional time is to be "determined" by the "judgment" of the engineer in charge does not in the least deprive the contractors of the additional allowance of time provided in the contract.

Again (p. 30), counsel for defendant, speaking of the engineer, say "the contract provides that he may extend if in his judgment he deems it reasonable." Not so. The provision of the contract is very definite. All that is submitted by the contract to the judgment of the engineer is the amount of time to be allowed in case the completion of the work is prevented by the elements. The contract nowhere

makes the *right* of the contractors to a reasonable extension dependent upon the judgment of the engineer, *but upon prevention by "freshets, etc., * * * and by no fault of their own."* It merely refers to his "judgment" the question what, in the contingency of such prevention, is a "just and reasonable" extension of time.

It is true that if the engineer thought that the contingency upon which the contractors' right to an extension depended had not arisen—in other words, if he thought that the completion of the work was not in fact prevented by "freshets, ice, or other force or violence of the elements," so as to give the contractors such a right—he would not exercise his judgment as to what amount of time would be "reasonable and just;" but that is a very different thing from saying (as counsel for appellee do, p. 29) that "the right to extension of time, *in case of prevention by the force or violence of the elements*, could not be demanded by the claimants as a matter of right, but could only be appealed for as a matter of *grace*, trusting to the sense of 'justice and reasonableness' of the engineer in charge."

Indeed, even if the contract were much more stringent than it is, and provided that the engineer should by his "judgment" determine not merely what would be a "just and reasonable" amount of additional time to be given the contractors in the contingency of prevention by "freshets," etc, but if it had also left it to the engineer to judge whether the work had in fact been prevented by "freshets, ice, or other force or violence of the elements, and by no fault of their own," that fact would not create an autocratic power in the engineer, but could at most be held to vest him with the final *judgment* as to whether or not the contingency of prevention by freshets, etc., in fact occurred; and this judgment of the engineer the contractors would have the fair and legal right to insist that he should exercise one way or the other.

To test this proposition, suppose the case of a continuous

and irresistible freshet during the whole period of the contract; that the contractors were not in any fault whatever, and that the engineer should refuse to say whether or not they had been prevented by the freshets from doing their work, but in stead should go away to China and stay there, would not the contractors have the legal right to have the question determined by the court? It may be said we are supposing an extreme case. It is true, but it is within the extreme limits of the proposition of counsel for the appellees when they expressly contend that "in case of prevention by the force and violence of the elements," the contractors have no right whatever, but must depend entirely upon the "grace" of the engineer.

Learned counsel contend that plaintiffs are in effect asking the court, "under the guise of interpretation, to make a new contract for parties." On the contrary, we claim that if we were in fact thus prevented, not by our own fault, but by freshets, etc., from completing the work, then the contract itself provides for "such additional time" as "shall be just and reasonable," and that we are entitled to that additional time. So far, we submit, there is no departure from the contract.

The contract also provides that in that contingency the engineer shall determine how much additional time should, in his "judgment," be allowed. We may go further and even admit that he is empowered to determine according to his own "judgment" the prior question also whether freshets, etc., and not the fault of the contractors, prevented the completion of the work. We may go further still and admit that his "judgment" on both these questions is final, unless tainted by fraud, gross error, or equivalent defect; and, lastly, we may admit that there was no taint of fraud; and yet, upon the assumption of this argument of Government's counsel, the contract has been broken by defendant, because the engineer utterly failed to exercise his "judgment" as to whether the freshets did or did not in fact, or

even necessarily, prevent the completion of the work and thereby entitle the contractors to "additional time," such as "in the judgment of the [engineer] may be just and reasonable" (Findings X, p. 37; XXI, p. 41).

Counsel for defendant maintain that the contract did not make the engineer an arbitrator, because, they contend, an award involves mutual obligation to be bound by the award, and because, they say (32): "We look in vain through this contract for any provision whereby the parties have agreed to be bound by the decision of the engineer in charge of the work concerning his action in granting or refusing an extension of time."

With proper respect, we submit that the proposition is like saying that no provision in any written contract binds the parties to it, unless the contract singles out each and every particular provision and says they are to be bound by it. The Government and contractors expressly "agreed" to all the terms of the contract. One of those terms was that in the event of prevention of work by freshets such additional time may be allowed "as in the judgment of the party of the first part or his successor shall be just and reasonable." That is the language of the contract. If it is to be construed, as we claim, to have a just and reasonable meaning, it is a substantial term of the contract, and is one of those things to which the parties "agreed" and by which they are therefore bound.

The case of Gordon *vs.* U. S. (7 Wall., 188) is so wholly unlike the one at bar that we are unable to see how it can be relied on in support of appellant's position. There the whole point decided was that several resolutions and acts of Congress concerning a claim against the United States had not submitted the claim to the Second Auditor of the Treasury Department for an award, but, as the court said, "they were merely designed as instructions to the officer by which to adjust the accounts, Congress reserving to itself the power to approve, reject, or rescind, or to otherwise act

in the premises as the exigencies of the case might require. In other words, these references only require the officer to act in a ministerial and not a judicial capacity." The court found that "the act or resolution referring this inquiry to the Second Auditor did not authorize him to make a final adjustment of the matter embraced in it." [Whereas these contracts, binding both parties expressly, leaves the question of how much additional time to the judgment of the engineer.] "It did not bind the appellant to an acceptance of the amount reported by the Secretary."

Counsel for appellant have fallen into an error of fact to which the court's attention should be called. On page 22 of their brief they say:

"The contract provides that the engineer in charge of the work shall be given the discretion (subject to the approval of the Chief of Engineers) to grant such extension of time as in his judgment shall be 'just' and 'reasonable.'"

This is incorrect. The contract (Rec., p. 11) does, indeed, provide that "change in the *character and quantity*, whether of labor or material," must be agreed on in writing and approved by the Secretary of War, and the contract in its final clause (Rec., p. 15) says: "This contract shall be approved by the Chief of Engineers," but there is not a word in it to justify the idea that the exercise of the "judgment" of the engineer in charge as to what extensions of time "shall be just and reasonable" is subject to the approval of the Chief of Engineers or any one else.

It will not do, therefore, upon the erroneous hypothesis that the judgment of the engineer in charge was subject to the approval of the Chief of Engineers, to say that this judgment of the engineer in charge was not agreed upon by the parties as an arbitrament, but was only the performance of a ministerial duty to his superior, as in the Gordon case, for in fact the contract gives the Chief of Engineers no such revisory power.

Counsel for appellant, whilst admitting (p. 21) that the decision of the engineer may be reviewed under some circumstances and set aside for actual or constructive fraud, contend that this rule only applies to his decisions upon physical facts (such as "measurements," "quality and amount of work done," &c.) and say:

"In cases of this kind the courts have uniformly held "that where the contract provides that the decision of the "engineer in charge concerning these matters shall be final "said engineer acts in the nature of an arbitrator and that "when he makes his award under such contract, it is con- "clusive upon all parties, unless tainted with fraud or such "gross error as necessarily implies bad faith. But the de- "cisions of the courts in that class of cases can have no ap- "plication to a case like the one at bar, where the decision "sought to be reviewed is a psychological determination and "not an action upon the physical fact." Not so. First, there *was* no decision. It is of this we have complained. Secondly, the question submitted to the lower court was the very physical one, whether freshets made the completion of the work in the year given the contractors to do it impracticable. If so, they should have had "such additional time" as would have been "just and reasonable," and, the engineer having refused any, the court will not let them suffer by his wrong.

We understand counsel for appellant to contend that even if the engineer's decision is held to be reviewable by the court, it can only be set aside by the proof of actual or practical fraud committed against claimants, and that the evidence in the record discloses no fraud, actual or constructive. This contention is based upon a fatal assumption, namely, that the engineer did render a decision. In truth, he never did (Findings X, p. 37, and XXI, p. 41).

Now, the whole argument of counsel for appellant on this proposition is based on the idea that a "decision" of the

engineer is sought to be reviewed (which is not true, for there was no such decision), and they proceed to show that such a decision of the engineer cannot be set aside without actual or constructive fraud—a proposition which is admitted and immaterial, in view of the fact that a decision cannot be fraudulent which has never been rendered.

By way of summary, let us state our contentions as to the clause relating to extension of time for completing the work and the engineer's powers concerning such extension.

First. We contend that the clause does *not* make the engineer judge for or as between the parties of the question whether the completion within the required time was prevented by "freshets" without fault of the contractors; but that it distinctly limits his power to fixing the amount of additional time which may be allowed the contractors if prevented by freshets, etc., and not by fault of their own.

Hence, under this proposition, we contend that—

(1.) It is not necessary for the contractors to show that the engineer rendered no decision as to prevention by freshets, for such a decision would have been beyond his province.

(2.) It is not necessary to show that his decision was fraudulent or grossly erroneous, and for the same reason, namely, that the contracts gave him no power to render a decision on that point.

(3.) It is not necessary to show that his decision (if any) is reviewable, and that also because it was beyond his powers.

But if we should be wrong in our first proposition, namely, that the engineer was not given power to determine for the parties the fact of prevention by freshets, etc., and if it be

true that under the contracts he was authorized to determine this fact, so as to bind the parties, then we contend:

Second. That the appellees had a right to a decision from the engineer as to whether the completion of the work was prevented by the freshets, etc. But he made no such decision (Findings X and XXI, pp. 36, 41), and his failure to do so constituted a fraud in law on the rights of the contractors (Crane Elevator Co. *vs.* Clark, 80 Fed. Rep., 705).

Under this proposition we contend that:

(1.) The engineer (if he had the power to determine this question so as to bind the parties) was in the position of an arbitrator.

(2.) If (as is shown to be a fact by Findings XVII and XX, Rec., pp. 38, 41) it now appears that the non-completion of the work during the last extension was due to the "freshets," etc., without fault of the contractors, then they had the contract right to a further reasonable extension, *unless* the engineer in fact decided that they were not prevented by the freshets, etc.

(3.) It is settled by Findings X and XXI (Rec., pp. 36, 41) that the engineer rendered no such decision. The coro lary of this proposition is that the contractors had the contract right to the reasonable extension.

But, again, if we should be wrong in our second proposition also, and if we should grant that the engineer was authorized to determine for the parties the question of fact as to whether the non-completion was prevented by freshets, etc., or by fault of the contractors, and if we should grant also (notwithstanding the findings of the lower court to the contrary) that the engineer did in fact decide this question adversely to the contractors, then we contend:

Third. The decision of the engineer (assuming there was one) was so grossly erroneous that under the authorities it will be deemed constructively fraudulent, and be disregarded. Under this proposition we will merely refer generally to—

1. The official reports (Finding VII, pp. 34–36) and to Findings XVII (p. 38) and XX (p. 41), showing conclusively the "unprecedented" condition of the river, and that it would be an error so gross as to amount in law to a fraud on the contractors' rights for the engineer to have held that freshets, which made the completion of the works an impossibility, did not supervene during the last extensions.

2. If the engineer be supposed to have decided the contractors were in fault, it appears clearly that he made no distinction between previous concluded terms (prior to December 31, 1887, in case of the Upper work, and prior to August 31, 1888, in case of the Lower work) and the last extended terms of the contracts, "but based "his refusal" (and the Court of Claims finds this to be a fact) "to further extend the contract because, as he asserted, the claimants had for a *number of seasons* failed to complete the work."

Findings X, p. 37, and XXI, p. 41.

A refusal to extend *on such ground*, allowing waived and condoned faults (if any) to influence his judgment, vitally impairs the justice of his action and precludes it from being held to be final.

The engineer appears to have reasoned that if the contractors had done more excavation during the first part of the time allowed for the work prior to the last extension, they might have completed the work. Therefore they were at fault, and he would be doing them no unmerited damage

in refusing the last extension asked for on account of the freshets. If he was thus acting under the mistaken idea that he could take into consideration old and condoned faults, he could make a decision which in effect defrauded the contractors without intending to do so, justifying his action to himself by the above reasoning; but the *effect*, and not the intent, of the engineer's action must be considered in inquiring whether the contracts have been in fact broken by the appellants and the contractors virtually defrauded.

The engineer must exercise a sound and reasonable discretion (Opinion, Rec., p. 46) if his decision is to be held final. It must not be grossly fanciful or arbitrary. If the engineer had, on account of the freshets and in order to comply technically with the contract, allowed the contractors additional time, consisting of *one day*, such a finding would have absolutely taken away the rights of the contractors, enormously damaged them, and have amounted, in effect (though, perhaps, not in intention) to a fraud. Still more so if he should refuse, as he did in this case, even one day. Such a decision could not be held to be final. It would not be held to be *damnum absque injuria* unless there were no escape from such finding, and a means of relief exists under the exceptions to the finality of the officer's decision noted in Martinsburg R'y Co. *vs.* March, 114 U. S., 549, and cases there cited.

Perhaps we should refer to a few inaccuracies in appellants' brief lest the court be misled.

On page 2 it is said:

"The season from August, 1885, was unusually favorable for the prosecution of this character of work, yet the contractors *wholly by reason of their own wrong, default and neglect*, failed to perform the work." * * * (The italics are ours.)

In several other places the same idea is reiterated. Yet the findings of the lower court contain no such conclusion. In its opinion (Rec., p. 44) it expressly says:

"As to whether the extensions or allowances of additional time prior to December, 1888, were or not granted on sufficient grounds, we are not called upon to decide. * * * Both parties treat the extensions as having been made on sufficient grounds. * * * so that, for the purpose of these cases, we have only to do with the contracts as last extended." * * *

As we have seen, our contention has been that the extensions which were granted having been, presumably, granted upon sufficient grounds and having eliminated all necessity for inquiring into those grounds, there was no occasion for the contractors to prove that they had not been in default. Moreover, as the lower court says:

"Whatever delays or defaults on the parts of the claimants may have occurred prior to the last extensions of the contracts were waived by the defendants when the extensions thereof were granted; no forfeitures were declared at the time, and by the several extensions were waived, and once waived, cannot be revived."

Pigeon's case, 27 Ct. Cl. R., 167, 175.

On page 2, appellants' brief says:

"As a matter of grace and without any pretense of right, they [the contractors] asked that the time for the completion of their contract be extended." * * *

The same idea is reiterated. We submit that it is not warranted by the record, is not found in the findings of fact, and is immaterial for the reasons just given.

On page 3, appellants' brief says, with reference to the year 1887:

"The failure of the claimants to complete the same was not in anywise due to the force or violence of the ele-

ments, but wholly to their own fault or neglect (Finding XIX, Rec., p. 39.)"

A reference to the finding will, we think, show that the lower court did not find either of the facts asserted. On the contrary, both the findings and the opinion show that the court did not feel called upon to consider the causes of failure to complete the work prior to the last extension in 1888.

The statement on page 4 of appellants' brief that the engineer refused the last extension asked for reasons there stated is, we think, in direct opposition to Findings VIII and X (Rec., p. 36), and is apparently based entirely upon the affidavit of the engineer filed in support of the motion for a new trial. This affidavit is elsewhere discussed fully.

The contractual meaning of "may," having the effect to "entitle as of right" to an extension of time in the event of prevention by freshets, is distinctly admitted at the top of page 7 of Appellants' Brief; also at the bottom of page 8, where it is stated "then they might be *entitled* to such additional time," etc. This is exactly the meaning for which the appellees contend. The counsel for the appellants then proceed to show that the provisions for additional time in case of freshets, etc., did not continue beyond the original terms of the contracts and had no existence during any of the extensions of either contract.

It is very difficult to follow the argument. The learned counsel appear to realize it themselves at the bottom of page 11 of their brief, where, after arguing that the contracts as extended contained and consisted of the element of time only, and that "the legal rights and duties which flowed from" the contracts were not extended, they feel obliged to add, "Of course the work was to be done in the manner "set forth in the plans and specifications, and the pay-"ment for the work was to be made," etc. If all of these parts and provisions of the original contracts subsisted in the extensions, whence do the learned counsel

derive the authority to drop out from the contracts as extended the original provisions as to additional time in case of freshets? Why not drop out any other provision at random; for instance, that by which the contractors were entitled to 85 cents per cubic yard, or that by which they had a property in the excavated rock, or that by which the Government had power to annul for laches? Further on the counsel for the appellants argue (pages 14, 15 of their brief) that a guarantor is not held if a contract be "changed," and therefore the clause "but such allowance and extension shall in no manner affect the rights and obligations of the parties," etc. (Rec., p. 11, fol. 20), is necessary to hold the sureties on these contracts. We may ask, What becomes of the obligations of such sureties if the original contracts be "changed" to the extent of holding the contractors to unlimited performance even if freshets supervene? It does not seem possible that, where contracts are extended in point of time for performance without any other new agreements, any other view can be taken than that all clauses and provisions of the contracts not already fulfilled are equally extended and have effect during such extended time.

As to the sufficiency of the findings of the Court of Claims to sustain the judgment, we submit:

It was not for the Court of Claims to find for what specific times the contracts ought reasonably to have been extended. It was for the engineer officer to have fixed such time. An extension of reasonable time means simply time reasonably sufficient for the completion of the work, considering its condition. It is a sufficient basis for the judgment for that court to find (*a*) the facts which constituted breaches of the contracts on the part of the appellees, namely, the refusal to allow (Findings X, p. 36, and XXI, p. 41) the additional time promised in the contracts in case of freshets, etc. (Rec., pp. 11, 24).

(*b*.) The damages resulting to the appellees from not per-

forming the contracts, namely (1), the loss of the retained 10 per centum (Findings XI, p. 37, and XXIII, p. 41). This is clearly recoverable under the decisions referred to in the opinion below, where the court says, "The defendants concede that the claimants are entitled to recover" (Rec., p. 50). This is also admitted in Appellants' Brief (p. 48).

(2.) The profits which the appellees would have reasonably made by completing the contracts.

These immediate prospective profits are distinctly found by the court below (Findings XII to XVI, pp. 37, 38, and XXIV, XXV, pp. 41, 42).

It is presumed that a contractor will perform his contract if permitted by the other party. One party cannot commit a breach of a contract and then be permitted to say in justification or excuse that even if he had not so broken it the other party never would have performed it.

If the Government did not finish the work in 1889 (Appellants' Brief, p. 40), that is immaterial to the question of appellees' completing the works. On the Upper work they had completed 35,435 yards, and the Lower work was nearly finished, the appellees having excavated over 90 per cent. of the amount required by the contract (Findings XII, p. 37; XXIV, p. 41; XXV, p. 42). In this connection attention is called to a material error on page 39 of Appellants' Brief, where the amount excavated by the appellees is stated as 14 per cent. On the contrary, they had completed over 60 per cent. of the two contracts taken together.

It is also to be borne in mind that for the season of 1888 the appellees provided expensive additions to their plant, which they were prevented from using to any extent by the freshets (Findings VIII, p. 36; VII, p. 34; XVII, p. 38).

With an extension of a reasonable amount of time and the aid of this plant the contracts could easily have been completed.

THE APPELLEES' APPEAL FROM THE ORDER OF THE COURT OF CLAIMS OVERRULING A MOTION FOR A NEW TRIAL.

It is submitted by the appellees that the question of a new trial in the Court of Claims was settled finally by the trial court, acting in its sound discretion, after a consideration of all the evidence, and particularly after a comparison of the evidence in support of the motion for new trial, with the other evidence in the case.

From such a decision the appeal taken herein (Rec., p. 55) does not lie, and the order of the Court of Claims denying a new trial is not subject to review by this honorable court.

The just determination of the question of a new trial requires a knowledge and consideration of all the evidence, both that upon which the original judgment upon the merits was reached and that presented in support of the motion. The court below had such a record before it in passing upon the motion, but this honorable court has not.

The language of the statute (Rev. St., 1088) leaves the question of granting a new trial entirely to the Court of Claims and to no other tribunal. No appeal to this court from the grant or refusal to grant is provided for. An appeal certainly would have been provided for if intended, for to make the determination of such a question in the trial court appealable would be extraordinary and possibly not "according to the rules of the common law" (Constitution of the United States, 7th amendment).

The motion for new trial was made upon no grounds except such as related entirely to the discretion of the trial court (74).

If the court below had declined to *entertain* the motion for a new trial, it would be within the jurisdiction of this honorable court to cure such an error, and by mandate di-

rect the court below to consider the motion and exercise its discretion thereon.

Metropolitan R. Co. *vs.* Moore, 121 U. S., 558.

But without undertaking to limit or direct such discretion.

Ex P. Russell, 13 Wall., 664.
Belknap *vs.* United States, 150 U. S., 591.

Or to review it.

Blitz *vs.* United States, 153 U. S., 312.
Addington *vs.* United States, 165 U. S., 185.
Wabash R'y Co. *vs.* McDaniels, 107 U. S., 456.
Willis *vs.* Board of Comm'rs, 86 Fed. Rep., 877.
And cases there cited.

But the court below has not abridged any right of the appellants. The motion has been heard and determined in the sound discretion of the court, cognizant of all the evidence.

The findings of the Court of Claims in an action at law determine all matters of fact, like the verdict of a jury (U. S. *vs.* New York Indians, Supreme Court, March 20, 1899, and cases there cited). Certainly, the finding of the Court of Claims on a question of fact or new trial is final, like that of a trial judge after a jury trial.

The appellants based their motion for a new trial partly upon an affidavit of Colonel Stickney (Rec., p. 51).

While this affidavit does not seem to be in any way material or competent evidence upon any question which can properly arise in this court, yet some importance seems to be attached to it by counsel for the appellants, and it will be briefly discussed.

The findings were reconsidered by the court upon motion of the appellants (Rec., p. 54), amended, and made in their present form after consideration of this affidavit (Rec., pp.

52–54). So far as the affidavit fails to agree with the findings it is overcome by the latter (Zeigler *vs.* Hopkins, 117 U. S., 683).

Examining the affidavit in detail, we find it states five grounds upon which the engineer refused to grant the appellees further extension of time. The first contains two assumptions of fact, namely: "The failure of Gleason and "Gosnell to either finish their work at the time called for "by the last extension of the contracts, or to make proper "provisions for carrying on the work." The court below, however, finds the facts that the freshets of the river were unprecedented and prevented the appellees from completing the work within the time allowed (Finding VII, p. 34); that no act or omission of the claimants during the period of the last extension prevented them, and that they were diligent in preparing for the work, in prosecuting it, and in endeavoring to exclude the water and freshets of the river (Finding VIII, p. 36).

The second ground of the affidavit is "that the said con-"tractors did not fulfill the conditions upon which their "time had already been extended." The court below finds to the contrary (Finding VIII, p. 36).

The third ground of the affidavit is "that the lenience "already shown said contractors in extending one of the "contracts twice and the other three times had not brought "forth such efforts on the part of the contractors as the cir-"cumstances required." If this statement refers to efforts prior to the last extension it confirms Findings X (Rec., p. 36) and XXI (Rec., p. 41), to the effect that the engineer based his refusal to extend the contracts upon the assertion that the claimants had for a number of seasons failed to complete the work within the times agreed upon; but these failures, even if due to fault of the claimants (appellees), had been condoned by the appellants by subsequent renewals of the contracts *for their own interest and benefit* (see letters of engineer, Rec., pp. 33, 39), and could not thereafter be re-

vived against the contractors (Pigeon's case, 27 C. Cl. R., 167, 175; opinion, Rec., p. 44).

If this statement of the affidavit refers to efforts during the last extension, it is contrary in fact to Findings VIII (Rec., p. 36) and XX (Rec., p. 41) and is overcome thereby.

The fourth statement of the affidavit is in substance the same as the third.

The fifth statement is "that the faults of the said con-"tractors deprived them of the right to demand further "extensions." The affidavit leaves undetermined the time of the alleged faults. Presumably they were prior to the last extension, for the findings show that there were no faults during the period of the last extension (Findings VIII and XX, Rec., pp. 36, 41).

This statement of the affidavit confirms Findings X and XXI (Rec., pp. 36 and 41) that the engineer based his refusal to extend on prior faults. If the affidavit means that there were faults during the last extension, it is contrary to Findings VIII and XX (pp. 36, 41).

A final statement of the affidavit is "that he exercised "his judgment in the fullest degree upon the contractual "stipulation relating to extension of time, taking into con-"sideration all of the facts of the case."

This is contrary to Findings X and XXI (Rec., pp. 36, 41), which were based not only on the testimony of the engineer, which differed from his affidavit, but on evidence of what his statements were at the time he refused a further extension of either contract. It may be added that these findings were amended by the court below and made in their present form after consideration of the affidavit.

This general fault-finding affidavit is negatived with some force by the fact that after the appellees had been at work nearly half (42 per cent.) of the total time spent on the contract for this Upper work, this affiant entered into a contract with the appellees for the performance by them of the Lower work (Finding XVIII, p. 38).

Upon principle and precedent the appeal from the or
of the court below overruling the motion for a new t
should not be entertained by this honorable court.

As bearing on the merits of the case, it is submitted t
to give any consideration or weight to this affidavit wo
be contrary to all sound practice and precedent, becaus
is not accompanied by the whole mass of evidence wh
the court below considered and weighed in arriving at th
findings, and that the *findings only* are to be accepted as
rectly stating the facts established by the evidence.

The reference to the affidavit (taken entirely *ex parte* a
never admitted below as evidence on the merits) made
page 26 of the Appellants' Brief, and all argument ba
thereon, therefore seems incompetent and improper.

It is submitted, in conclusion, that the judgment of
court below should stand.

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